

ORIGINAL

FILED IN CLERK'S OFFICE
U.S.D.C. - Atlanta

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

AUG 05 2011

JAMES D. HATTEN, Clerk
By: *[Signature]* Deputy Clerk

CONART PRECAST LLC

Plaintiff,

v.

DEPARTMENT OF VETERANS
AFFAIRS

Defendant.

WBH

CIVIL ACTION FILE

NO. 11-CV-2593

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, ConArt Precast LLC ("ConArt" or "Plaintiff") hereby sues Defendant, the Department of Veterans Affairs (the "VA" or "Defendant") and states as follows:

INTRODUCTION

1.

This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to compel the production of records relating to requests by Plaintiff to the Department of Veterans Affairs for several categories of documents related to VA construction projects.

JURISDICTION

2.

This Court has subject matter jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B).

PARTIES

3.

Plaintiff is a domestic corporation with its principal place of business located in Cobb County, Georgia.

4.

Defendant VA is an agency of the federal government of the United States and has possession of and control over the records Plaintiff seeks.

VENUE

5.

Venue is proper in this Court pursuant to 5 U.S.C. 552 (a)(4)(B) because Plaintiff resides in Cobb County, Georgia.

STATEMENT OF FACTS

6.

By letter to Defendant dated June 27, 2011, Plaintiff requested several categories of documents relating to construction projects in Florida pursuant to 5 U.S.C. § 552 (hereinafter “FOIA”). *See* Affidavit of Benjamin H. Sawyer, Esq. (“Sawyer Affidavit”) at ¶ 3 attached as Exhibit A hereto. Plaintiff’s FOIA request was delivered to the Regional Office of the VA, which maintained custody and control of the documents at issue per 38 C.F.R. § 1553. *Id.* at ¶ 4.

7.

On July 7, 2011 Plaintiff contacted Defendant via email correspondence to request a status on coordinating production of documents responsive to Plaintiff’s FOIA request. Defendant failed to respond to Plaintiff’s correspondence. *Id.* at ¶ 5.

8.

On July 14, 2011 Plaintiff contacted Defendant again concerning the status of coordinating production of documents responsive to Plaintiff’s FOIA request. Defendant failed to respond to Plaintiff’s correspondence. *Id.* at ¶ 6.

9.

On July 27, 2011 Plaintiff contacted Defendant yet again concerning the status of coordinating production of documents responsive to Plaintiff's FOIA request and advised that the time for the VA's response had lapsed. *Id.* at ¶ 7.

10.

Pursuant to 5 U.S.C. § 552(a)(6)(A)(i) and 38 C.F.R. § 1553a, Defendant had at most 20 working days to respond to Plaintiff's FOIA request. Plaintiff's FOIA request was delivered to the VA's Regional Office maintaining custody of the requested records on June 28, 2011. *Id.* at ¶ 4. Further, Defendant acknowledged receipt of Plaintiff's FOIA request in writing. *Id.* at ¶ 7.

11.

At no point in time did anyone from the VA request an extension of time to respond to Plaintiff's June 27, 2011 FOIA request.

12.

To date, Plaintiff has not received any records pertaining to the construction projects at issue.

13.

Plaintiff has therefore exhausted its administrative remedies under FOIA.

See 5 U.S.C. § 552 (a)(6)(C)(i).

14.

Plaintiff has a statutory right to the records it seeks, and there is no legal basis for Defendant's failure to disclose them to Plaintiff.

WHEREFORE, Plaintiff requests that this Court:

A) Declare that Defendant's failure to disclose the records requested by Plaintiff is unlawful;

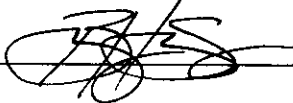
B) Order Defendant to make all the requested records available to Plaintiff and produce such records at Defendant's cost pursuant to 5 U.S.C. § 552(a)(4)(A)(viii);

C) Award Plaintiff its costs and reasonable attorney's fees pursuant to 5 U.S.C. § 552(a)(4)(E); and

D) Grant such other and further relief as this Court may deem just and proper.

Respectfully submitted this 4th day of August, 2011,

SUTHERLAND ASBILL & BRENNAN LLP

By: _____

Benjamin H. Sawyer
GA Bar No. 627935
999 Peachtree St. NE
Atlanta, Georgia, 30309
(404) 853-8000 (phone)
(404) 853-8806 (fax)
ben.sawyer@sutherland.com

Exhibit A

COUNTY OF FULTON)
)
STATE OF GEORGIA)

AFFIDAVIT OF BENJAMIN H. SAWYER, ESQ.

1. My name is Benjamin H. Sawyer, I am over twenty one (21) years of age, and I am competent to offer testimony concerning the matters contained herein.
2. I am a partner at the law firm of Sutherland Asbill & Brennan LLP in Atlanta, Georgia. At all times material hereto, I have served as counsel of record for Plaintiff, ConArt Precast LLC (“ConArt”) in this matter and I have personal knowledge of the matters averred to in this Affidavit.
3. By letter to the Department of Veterans Affairs (the “VA”) dated June 27, 2011, ConArt requested several categories of documents concerning construction projects in the State of Florida pursuant to 5 U.S.C. § 552 (“FOIA”). A true and accurate copy of ConArt’s June 27, 2011 FOIA request is attached hereto as Exhibit 1.
4. ConArt’s FOIA request was delivered via Federal Express to the Regional Office of the VA in Orlando, Florida, which maintained custody and control of the documents at issue. *See id.*

5. On July 7, 2011 I contacted representatives of the VA via email to request the status on coordinating inspection and production of documents responsive to ConArt's FOIA request. The VA failed to respond to this communication.

6. On July 14, 2011 I again contacted representatives of the VA concerning the status of coordinating production of documents responsive to ConArt's FOIA request. The VA failed to respond to this communication.

7. On July 27, 2011 I again contacted representatives of the VA concerning the status of coordinating production of documents responsive to ConArt's FOIA request and advised that the time for the VA's response had lapsed. A true and accurate copy of my correspondence with the VA is attached hereto as Exhibit 2. Thereafter, the VA acknowledged receipt of ConArt's June 27, 2011 FOIA request but advised that the request must be resubmitted and mailed to the VA's FOIA Officer in Washington D.C.

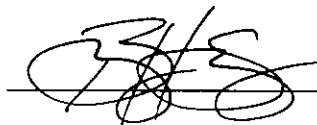
8. On or about July 28, 2011, I conducted a telephone conference call with Ms. Noella Bond, the Contracting Officer for the projects that are the subject of ConArt's June 27, 2011 FOIA request. The Contracting Officer stated again that all FOIA requests must be mailed directly to the VA's FOIA Officer in Washington, D.C.

9. At no point in time did anyone from the VA request an extension of time to respond to ConArt's June 27, 2011 FOIA request.

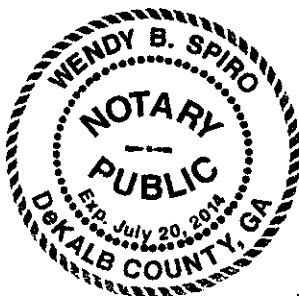
10. Even though 38 CFR § 1553 expressly provides that all FOIA requests “should be made to the office concerned (having jurisdiction of the record desired),” I resubmitted ConArt’s June 27, 2011 FOIA request as directed by Ms. Bond on July 29, 2011. A true and accurate copy of ConArt’s resubmission of its original June 27, 2011 FOIA request is attached hereto as Exhibit 3.

11. As of the date of this affidavit no representative from the VA has responded to ConArt’s FOIA request, which was originally delivered to the VA on June 28, 2011.

FURTHER SAYETH AFFIANT NAUGHT



Benjamin H. Sawyer, Esq.
GA Bar No. 627935
999 Peachtree Street, NE
Atlanta, Georgia 30309-3996
SUTHERLAND ASBILL & BRENNAN LLP



Notary: Wendy B. Spiro

Exhibit 1

SUTHERLAND

SUTHERLAND ASBILL & BRENNAN LLP
999 Peachtree Street, NE
Atlanta, GA 30309-3996
404.853.8000 Fax 404.853.8206
www.sutherland.com

BENJAMIN H. SAWYER
DIRECT LINE: 404.853.8188
E-mail: ben.sawyer@sutherland.com

June 27, 2011

VIA FEDERAL EXPRESS

Mr. Bart Bruchok
Mr. Kristofer Clapp
Department of Veterans Affairs
Orlando VAMC RE Office
13800 Veterans Way, Suite 100
Orlando, FL 32827

Re: **Department of Veterans Affairs ("VA") Project VA-
101-CFM-C-0206, Bid Package No. 4 (the "Project");
DEMAND PURSUANT TO 5 USC §552**

Dear Messrs. Bruchok and Clapp:

This firm represents ConArt Precast LLC ("ConArt") in connection with the above referenced matter. This correspondence is submitted to demand rescission of the VA's directive to cancel ConArt's subcontract agreement 11080-004 (the "Subcontract") with Brasfield & Gorrie LLC ("Brasfield") concerning the Project and to further demand production of specific records regarding the purported bases for this direction pursuant to 5 USC § 552, *et. seq.*

ConArt is a successful precast concrete producer in the Southeastern United States and has over twenty (20) years experience performing work on major federal projects throughout the region in partnership with major general contractors. ConArt is also certified by the Precast/Prestressed Concrete Institute and has maintained such certification for over 15 years. Prior its interaction with representatives of the VA on this Project, ConArt had never had a Contracting Officer direct that its subcontract be cancelled in its 20 plus year history. As set forth more fully below, ConArt submits respectfully that the VA's decision is arbitrary and capricious as a matter of fact and law and constitutes an abuse of the discretion afforded the VA pursuant to VAAR 852.236-80(d).

12971888.1

Mr. Bart Bruchok
Mr. Kristofer Clapp
June 27, 2011
Page 2

In October 2010, ConArt entered into the Subcontract with Brasfield. Following award of the Subcontract, ConArt performed substantial work for the benefit of the Project including, among other things:

- Provision of project drawings associated and required for the work in November and December 2010;
- Provision of modifications and revisions to the project drawings on March 3, 2011;
- Development and provision of numerous concrete samples for the Project from January 2011 through June 15, 2011;
- Development and provision of detailed quality control plans in March 2011;
- Provision of embed plates to the contractor for installation on May 2nd and May 13, 2011.

Despite performing work pursuant to the Subcontract for over seven (7) months, ConArt first received notice that the Subcontract was being terminated for convenience per the directive of the VA on or about June 13, 2011. The only stated bases for the VA's determination were: 1) on an adjacent VA project the Contracting Officer observed unspecified "significant and consistent" deficiencies related to the craftsmanship and aesthetics of ConArt's product; and 2) on the adjacent VA project the same Contracting Officer's "acceptance of field finish product substitutes" provided at ConArt's cost rendered ConArt's performance unacceptable.

ConArt is not aware of any material issues related to the craftsmanship of its work. The project record confirms that the opposite is true. ConArt agrees that it expended significant time, capital, and resources to provide the VA with the precise color of concrete it desired for the adjacent VA Domiciliary Project at ConArt's expense. These good faith efforts, however, cannot be construed as failure in craftsmanship or a failure to comply with the specifications of the VA Domiciliary Project. The work in place fully complied in all material respects with the approved mock-ups for this project, as well as the project specifications. The foregoing notwithstanding, at all times ConArt worked and continues to work diligently to achieve the aesthetics that the Contracting Officer requested to achieve completion of the work.

Given the substantial costs of reprourement, delays associated with such reprourement, the lack of any reasonable foundation to the VA's objections to ConArt, and ConArt's quality control protocol that was submitted to and approved by Brasfield many months ago, there is simply no rational basis for the VA's direction to Brasfield. Should the VA refuse to rescind its directive to Brasfield, then ConArt will seek all rights and remedies available to it under applicable law.

Mr. Bart Bruchok
Mr. Kristofer Clapp
June 27, 2011
Page 3

Additionally, pursuant to the Freedom of Information Act ("FOIA") 5 USC § 552 *et. seq.*, I am requesting any documents in your possession or control that relate to the following:

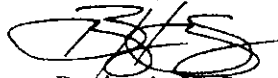
1. All documents that support, confirm, or relate to the VA's decision to refuse to permit ConArt to perform work on the Project;
2. All documents that support, confirm, or relate to the VA's contention that it observed significant and consistent deficiencies in ConArt's product;
3. All documents that support, confirm, or relate to the VA's contention that ConArt's craftsmanship was deficient on adjacent VA project(s);
4. All documents that support, confirm, or relate to the VA's acceptance of ConArt's field applied product finishes on adjacent VA project(s);
5. All documents related to the preliminary engineering and blast calculations for the VA Chapel Project;
6. All documents related to the approved precast concrete shop drawings for the VA Chapel Project;
7. All documents related to concrete samples that were either approved or rejected for the VA Chapel Project;
8. All documents related to any outside testing performed on panels provided by ConArt for the VA Domiciliary Project;
9. All documents related to the acceptance or rejection of concrete panels provided by Gate Precast for the VA Chapel Project;
10. All documents between or among the VA and Brasfield concerning ConArt;
11. All documents related to ConArt's performance on the VA Chapel Project, the VA Domiciliary Project, and/or the Project;
12. All documents related to communications between the VA and other concrete product producers on this Project;
13. All documents related to the VA's evaluations of other concrete producers on the Project, the VA Chapel Project, and/or the VA Domiciliary Project;
14. All documents related to the VA's treatment of other concrete producers on this Project;

Mr. Bart Bruchok
Mr. Kristofer Clapp
June 27, 2011
Page 4

If you claim an exemption for all or part of the records, please comply with the FOIA by stating in writing and in a timely manner the basis of the exemption that you contend is applicable to the record, including the statutory citation to an exemption created or afforded by statute. Please state, in writing and with particularity, the bases for the conclusion that the record is exempt. If the records are not in your custody, please identify the current custodian. Pursuant to the FOIA, your response is required within twenty (20) days. ConArt is willing to pay costs associated with the provision of these documents up to \$500. If you estimate that the costs will exceed this amount, please contact me directly to coordinate production.

I look forward to your prompt attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'BHS', with a stylized flourish extending from the end.

Benjamin H. Sawyer

BHS/psy

cc: Leslie K. Coble, Esq.
Associate General Counsel – Brasfield & Gorrie, LLC

Exhibit 2

Sawyer, Benjamin

From: Sawyer, Benjamin
Sent: Friday, July 29, 2011 12:21 PM
To: 'Bond, Noella A. (CFM)'; Bruchok, Bart (CFM); Clapp, Kristofer R. (CFM)
Cc: North-Willis, Stacey; Fletcher, Jennifer; Buell, Lynn A. (CFM)
Subject: RE: ConArt Precast LLC; Project VA-101-CFM-C-0206
Attachments: 6.27.11 Ltr to Bart Bruchok and Kristofer Clapp.pdf

Thank you for your correspondence Ms. Bond. Please see the signed FOIA request that delivered via Federal Express in accordance with 38 CFR 1553 to the regional office of the VA having jurisdiction over the documents sought over one month ago.

Benjamin Sawyer | *Partner* | 404.853.8188

From: Bond, Noella A. (CFM) [mailto:Noella.Bond@va.gov]
Sent: Friday, July 29, 2011 9:45 AM
To: Sawyer, Benjamin; Bruchok, Bart (CFM); Clapp, Kristofer R. (CFM)
Cc: North-Willis, Stacey; Fletcher, Jennifer; Buell, Lynn A. (CFM)
Subject: RE: ConArt Precast LLC; Project VA-101-CFM-C-0206

Mr. Sawyer,

Accord to Ms. Buell, if you should read what you wrote in (a) concerning referring a FOIA request to the proper employee, you would understand that it has to be forwarded to the FOIA Officer. Also, a FOIA request must be signed. Until you send her a signed letter, via email, fax or USPS this is not a FOIA request.

Noella Bond
Contracting Officer (00CFM3B1)
Telephone 202 632-4723
FAX
Blackberry 202 725-5263

From: Sawyer, Benjamin [mailto:Ben.Sawyer@sutherland.com]
Sent: Thursday, July 28, 2011 11:26 AM
To: Bond, Noella A. (CFM); Bruchok, Bart (CFM); Clapp, Kristofer R. (CFM)
Cc: North-Willis, Stacey; Fletcher, Jennifer
Subject: RE: ConArt Precast LLC; Project VA-101-CFM-C-0206

Dear Ms. Bond:

Thank you for your correspondence below. If you would also kindly forward the email response that you unsuccessfully attempted to send to my attention on July 18, 2011 it would be appreciated.
Your direction and statements below are, however, incorrect. Specifically, pursuant to 38 CFR 1.553:

"Reasonably described records in VA custody, or copies thereof, other than records made available to the public under provisions of §§ 1.551 and 1.552 of this part, or unless otherwise provided for in title 38, Code of Federal

8/3/2011

Regulations, requested in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, will be made promptly available, except as provided in § 1.554 of this part, to any person upon request. Such request must be in writing, over the signature of the requester and must contain a reasonable description of the record desired so that it may be located with relative ease. **The request should be made to the office concerned (having jurisdiction of the record desired)** or, if not known, to the Director or Veterans Service Center Manager in the nearest VA regional office; the Director, or Chief, Medical Administration Service, or other responsible official of the VA medical facility where most recently treated; or to the Department of Veterans Affairs Central Office, 810 Vermont Avenue NW., Washington, DC 20420." (Emphasis additional).

ConArt's June 27, 2011 FOIA request concerns documents located at ongoing projects in the state of Florida, not Washington DC. Further, even if the requested documents were transported from Florida to Washington DC, it is incumbent upon the VA employee receiving the FOIA request to direct it to the proper official for determination within ten (10) business days. See 38 CFR 1.553a.

"(a) When a request for records made under § 1.551, § 1.552 or § 1.553 is received it will be promptly referred for action to the proper employee designated in accordance with § 1.556 to take initial action on granting or denying requests to inspect or obtain information from or copies of the records described.

(b) Any such request will then be promptly evaluated and a determination made within 10 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of the request whether the Department of Veterans Affairs will comply with the request. Upon determination to comply or deny the request the person making the request will be notified immediately of the determination and the reasons therefor, and of the right of the person to appeal to the Secretary of Veterans Affairs any adverse determination. Records to be furnished will be supplied promptly." (Emphasis additional).

Based upon your correspondence below, none of this has occurred.

Even the VA's most recent publications state:

"It is VA's policy to release information to the fullest extent under the law. The VA has a decentralized system for handling FOIA requests. **All FOIA requests should be addressed directly to any of the approximately 400 geographically-dispersed components that maintain the records you are seeking.**"
See <http://www.foia.va.gov/>

Per 38 CFR 1553a(e), ConArt has exhausted its administrative remedies at this point and is not inclined to wait another month for the VA's compliance with applicable law. Please contact me by the close of business tomorrow to coordinate production. Your prompt attention to this matter is appreciated.

Best regards,

Benjamin Sawyer | Partner | 404.853.8188

Benjamin Sawyer | Partner | 404.853.8188

From: Bond, Noella A. (CFM) [mailto:Noella.Bond@va.gov]
Sent: Wednesday, July 27, 2011 4:46 PM
To: Sawyer, Benjamin; Bruchok, Bart (CFM); Clapp, Kristofer R. (CFM)
Cc: North-Willis, Stacey; Fletcher, Jennifer
Subject: RE: ConArt Precast LLC; Project VA-101-CFM-C-0206

Mr. Sawyer,

8/3/2011

All requests for documents under the Freedom of Information Act (FOIA) must be mailed directly to VA's FOIA officer, Lyn Buell, at the following address:

Department of Veterans Affairs
Office of Construction and Facilities Management (00CFM2)
810 Vermont Ave, NW
Washington, DC 20420

See the attached regarding my previous email, which was undeliverable.

Noella Bond
Contracting Officer (00CFM3B1)
Telephone 202 632-4723
FAX
Blackberry 202 725-5263

From: Sawyer, Benjamin [mailto:Ben.Sawyer@sutherland.com]
Sent: Wednesday, July 27, 2011 3:36 PM
To: Bruchok, Bart (CFM); Clapp, Kristofer R. (CFM)
Cc: Bond, Noella A. (CFM); North-Willis, Stacey; Sawyer, Benjamin; Fletcher, Jennifer
Subject: RE: ConArt Precast LLC; Project VA-101-CFM-C-0206

Dear Mr. Bruchok,

Thank you for your response. Please advise who my IT department should contact directly. If possible, please forward the Contracting Officer's attempt to contact this office because I did receive your email below (and obviously you received mine). Could you also please let me know what's the VA's response to my client's FOIA request.

Best regards,

Benjamin Sawyer | *Partner* | 404.853.8188

From: Bruchok, Bart (CFM) [mailto:Bart.Bruchok@va.gov]
Sent: Wednesday, July 27, 2011 3:00 PM
To: Sawyer, Benjamin; Clapp, Kristofer R. (CFM)
Cc: Bond, Noella A. (CFM); North-Willis, Stacey
Subject: RE: ConArt Precast LLC; Project VA-101-CFM-C-0206

Please verify your email address; our Contracting Officer has attempted to contact you and messages have been returned, undelivered.

From: Sawyer, Benjamin [mailto:Ben.Sawyer@sutherland.com]
Sent: Wednesday, July 27, 2011 2:44 PM
To: Sawyer, Benjamin; Clapp, Kristofer R. (CFM); Bruchok, Bart (CFM)
Subject: RE: ConArt Precast LLC; Project VA-101-CFM-C-0206

Dear Messrs. Clapp and Bruchok:

Please advise whether the VA has mailed its response to ConArt's FOIA request because the deadline for its response has lapsed. Thanks.

8/3/2011

Benjamin Sawyer | *Partner* | 404.853.8188

From: Sawyer, Benjamin
Sent: Thursday, July 14, 2011 8:49 PM
To: 'kristofer.clapp@va.gov'; 'bart.bruchok@va.gov'
Cc: Sawyer, Benjamin
Subject: RE: ConArt Precast LLC; Project VA-101-CFM-C-0206

Gentlemen,

If please advise regarding the below. Thank you.

Benjamin Sawyer | *Partner* | 404.853.8188

From: Sawyer, Benjamin
Sent: Thursday, July 07, 2011 10:59 AM
To: 'kristofer.clapp@va.gov'; 'bart.bruchok@va.gov'
Cc: Sawyer, Benjamin
Subject: ConArt Precast LLC; Project VA-101-CFM-C-0206

Gentlemen,

I represent ConArt Precast LLC ("ConArt") in connection with the above referenced matter. I'm writing to follow up with ConArt's FOIA request and demand for rescission of the Government's directive to Brasfield & Gorrie on Project VA-101-CFM-C-0206, Bid Package No. 4. Please let me know if you are handling this matter and if you or the Government have engaged counsel please provide me with their contact information and I will direct all future correspondence/communications to their attention. Thanks in advance and I look forward to hearing from you.

Best regards,

Benjamin Sawyer | *Partner*



Sutherland Asbill & Brennan LLP
999 Peachtree Street NE | Atlanta, GA 30309-3996
404.853.8188 direct | 404.853.8806 facsimile
Ben.Sawyer@sutherland.com | www.sutherland.com

CIRCULAR 230 DISCLOSURE: To comply with Treasury Department regulations, we inform you that, unless otherwise expressly indicated,

8/3/2011

any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties that may be imposed under the Internal Revenue Code or any other applicable tax law, or (ii) promoting, marketing or recommending to another party any transaction, arrangement, or other matter.

This e-mail message is intended only for the personal use of the recipient(s) named above. This message may be an attorney-client communication and as such privileged and confidential. If you are not an intended recipient, you may not review, copy, or distribute this message. If you have received this communication in error, please notify us immediately by e-mail and delete the original message.

8/3/2011

Exhibit 3

SUTHERLAND

SUTHERLAND ASBILL & BRENNAN LLP
77 Peachtree Street, NE
Atlanta, GA 30309-3996
404.353.8000 Fax 404.353.8806
www.sutherland.com

BENJAMIN H. SAWYER
DIRECT LINE: 404.853.8188
E-mail: ben.sawyer@sutherland.com

July 28, 2011

VIA FEDERAL EXPRESS

FOIA REQUEST

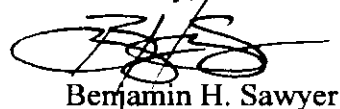
Attn: Ms. Lyn Buell
Department of Veterans Affairs
Office Construction and Facilities
Management (00CFM2)
810 Vermont Avenue, NW
Washington, DC 20420

Re: Freedom of Information Act Request

Dear Ms. Buell:

This firm represents ConArt Precast LLC in connection with the above-referenced matter. Please find enclosed ConArt Precast LLC's Freedom of Information Act Request that was previously served on the Department of Veterans Affairs (at the regional office where the documents are located) on June 28, 2011.

Cordially,


Benjamin H. Sawyer

BHS/psy
Enclosure

SUTHERLAND

SUTHERLAND ASHILL & FREEMAN, LLC
222 Peachtree Street, NE
Atlanta, GA 30309-3526
404.853.8188 Fax 404.853.8400
www.sutherland.com

BENJAMIN H. SAWYER
DIRECT LINE 404 853 8188
E-mail: ben.sawyer@sutherland.com

June 27, 2011

VIA FEDERAL EXPRESS

Mr. Bart Bruchok
Mr. Kristofer Clapp
Department of Veterans Affairs
Orlando VAMC RE Office
13800 Veterans Way, Suite 100
Orlando, FL 32827

Re: **Department of Veterans Affairs ("VA") Project VA-
101-CFM-C-0206, Bid Package No. 4 (the "Project");
DEMAND PURSUANT TO 5 USC §552**

Dear Messrs. Bruchok and Clapp:

This firm represents ConArt Precast LLC ("ConArt") in connection with the above referenced matter. This correspondence is submitted to demand rescission of the VA's directive to cancel ConArt's subcontract agreement 11080-004 (the "Subcontract") with Brasfield & Gorrie LLC ("Brasfield") concerning the Project and to further demand production of specific records regarding the purported bases for this direction pursuant to 5 USC § 552, *et. seq.*

ConArt is a successful precast concrete producer in the Southeastern United States and has over twenty (20) years experience performing work on major federal projects throughout the region in partnership with major general contractors. ConArt is also certified by the Precast/Pre-stressed Concrete Institute and has maintained such certification for over 15 years. Prior its interaction with representatives of the VA on this Project, ConArt had never had a Contracting Officer direct that its subcontract be cancelled in its 20 plus year history. As set forth more fully below, ConArt submits respectfully that the VA's decision is arbitrary and capricious as a matter of fact and law and constitutes an abuse of the discretion afforded the VA pursuant to VAAR 852.236-80(d).

12971888.1

Mr. Bart Bruchok
Mr. Kristofer Clapp
June 27, 2011
Page 2

In October 2010, ConArt entered into the Subcontract with Brasfield. Following award of the Subcontract, ConArt performed substantial work for the benefit of the Project including, among other things:

- Provision of project drawings associated and required for the work in November and December 2010;
- Provision of modifications and revisions to the project drawings on March 3, 2011;
- Development and provision of numerous concrete samples for the Project from January 2011 through June 15, 2011;
- Development and provision of detailed quality control plans in March 2011;
- Provision of embed plates to the contractor for installation on May 2nd and May 13, 2011.

Despite performing work pursuant to the Subcontract for over seven (7) months, ConArt first received notice that the Subcontract was being terminated for convenience per the directive of the VA on or about June 13, 2011. The only stated bases for the VA's determination were: 1) on an adjacent VA project the Contracting Officer observed unspecified "significant and consistent" deficiencies related to the craftsmanship and aesthetics of ConArt's product; and 2) on the adjacent VA project the same Contracting Officer's "acceptance of field finish product substitutes" provided at ConArt's cost rendered ConArt's performance unacceptable.

ConArt is not aware of any material issues related to the craftsmanship of its work. The project record confirms that the opposite is true. ConArt agrees that it expended significant time, capital, and resources to provide the VA with the precise color of concrete it desired for the adjacent VA Domiciliary Project at ConArt's expense. These good faith efforts, however, cannot be construed as failure in craftsmanship or a failure to comply with the specifications of the VA Domiciliary Project. The work in place fully complied in all material respects with the approved mock-ups for this project, as well as the project specifications. The foregoing notwithstanding, at all times ConArt worked and continues to work diligently to achieve the aesthetics that the Contracting Officer requested to achieve completion of the work.

Given the substantial costs of reprourement, delays associated with such reprourement, the lack of any reasonable foundation to the VA's objections to ConArt, and ConArt's quality control protocol that was submitted to and approved by Brasfield many months ago, there is simply no rational basis for the VA's direction to Brasfield. Should the VA refuse to rescind its directive to Brasfield, then ConArt will seek all rights and remedies available to it under applicable law.

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Additionally, pursuant to the Freedom of Information Act ("FOIA") 5 USC § 552 *et. seq.*, I am requesting any documents in your possession or control that relate to the following:

1. All documents that support, confirm, or relate to the VA's decision to refuse to permit ConArt to perform work on the Project;
2. All documents that support, confirm, or relate to the VA's contention that it observed significant and consistent deficiencies in ConArt's product;
3. All documents that support, confirm, or relate to the VA's contention that ConArt's craftsmanship was deficient on adjacent VA project(s);
4. All documents that support, confirm, or relate to the VA's acceptance of ConArt's field applied product finishes on adjacent VA project(s);
5. All documents related to the preliminary engineering and blast calculations for the VA Chapel Project;
6. All documents related to the approved precast concrete shop drawings for the VA Chapel Project;
7. All documents related to concrete samples that were either approved or rejected for the VA Chapel Project;
8. All documents related to any outside testing performed on panels provided by ConArt for the VA Domiciliary Project;
9. All documents related to the acceptance or rejection of concrete panels provided by Gate Precast for the VA Chapel Project;
10. All documents between or among the VA and Brasfield concerning ConArt;
11. All documents related to ConArt's performance on the VA Chapel Project, the VA Domiciliary Project, and/or the Project;
12. All documents related to communications between the VA and other concrete product producers on this Project;
13. All documents related to the VA's evaluations of other concrete producers on the Project, the VA Chapel Project, and/or the VA Domiciliary Project;
14. All documents related to the VA's treatment of other concrete producers on this Project;

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If you claim an exemption for all or part of the records, please comply with the FOIA by stating in writing and in a timely manner the basis of the exemption that you contend is applicable to the record, including the statutory citation to an exemption created or afforded by statute. Please state, in writing and with particularity, the bases for the conclusion that the record is exempt. If the records are not in your custody, please identify the current custodian. Pursuant to the FOIA, your response is required within twenty (20) days. ConArt is willing to pay costs associated with the provision of these documents up to \$500. If you estimate that the costs will exceed this amount, please contact me directly to coordinate production.

I look forward to your prompt attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'BHS', with a stylized flourish underneath.

Benjamin H. Sawyer

BHS/psy

cc: Leslie K. Coble, Esq.
Associate General Counsel – Brasfield & Gorrie, LLC



<i>package id</i>	<i>from</i>	<i>vendor</i>
0057706	Benjamin Sawyer (3860)	FedEx
<i>ship date</i>	Sutherland	<i>tracking number</i>
Thu, Jul 28	999 Peachtree St., NE	795023453439
<i>to</i>	Atlanta, GA 30309 US	<i>service</i>
Ms. Lyn Buell		FedEx Priority
Department of Veterans	<i>billing</i>	<i>packaging</i>
Affairs	ConArt Precast,	FedEx Envelope
810 Vermont Ave NW	Inc., Veteran's	<i>signature</i>
Washington, DC 20420-	Administration	Indirect signature - at or
0002 US	(31442.0001)	near address
404-853-8000	FOIA Request	
<i>residential address</i>	<i>operator</i>	<i>courtesy quote</i>
No	Paula Yates	13.52
<i>return label</i>	404-407-5079	<i>The courtesy quote does not</i>
No	paula.yates@sutherland.co	<i>reflect fuel surcharge and does</i>
	m	<i>not necessarily reflect all</i>
<i>notification type</i>	<i>create time</i>	<i>accessorial charges.</i>
Label Creation	07/28/11, 4:08PM	
Delivery		
<i>notification recipients</i>		
paula.yates@sutherla...		
<i>notification message</i>		
FOIA Request		

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